employer no damages for the value of the rest of the suretyship contract. But a much more cogent objection is that the rule of inequitable conduct has never been held to require any affirmative action by the principal.

These doctrines of limiting damages and of a defence from inequitable conduct are only examples of equitable relief against the express terms of a contract. Since, as we have seen, release of the surety falls within the established limits of neither doctrine, is it not better, if the surety is to be released, to let it be by frankly recognizing a new application of the broader principle of equitable variation of the contract?

NEUTRAL SHIPS AND CONTRABAND CARGOES: HAS A CHANGE IN INTERNATIONAL LAW BEEN EFFECTED? — The law of nations has been changed, in respect to condemnation by a belligerent of neutral vessels engaged in carrying contraband, according to two recent decisions of the Admiralty Division of the High Court of Justice, sitting in Prize.[1] Since the Napoleonic wars at least[2] Great Britain has consistently held the mere carriage of contraband, uncoupled with evidence of knowledge by the shipowner of the character of the cargo, to be insufficient to subject the carrying ship to confiscation.[3] This view was taken also by the United States[4]

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[1] The Hakan and The Maricaibo, [1916] P. 266.

[2] This rule was definitely adopted by the decisions of Lord Stowell, then Sir William Scott, in 1798 and 1799. The Sarah Christina, 1 C. Rob. 237, 242; The Mercurius, 1 C. Rob. 288. See also The Staadt Embden, 1 C. Rob. 26, 30; The Ringende Jacob, 1 C. Rob. 89, 90; The Neutralitet, 3 C. Rob. 295. In The Ringende Jacob it was said: "I do not know that under the present practice of the law of nations a contraband cargo can affect the ship. . . . By the ancient law of Europe such a consequence would have ensued; nor can it be said that such a penalty was unjust, or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expences; except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo, has been connected with other malignant and aggravating circumstances."

Bynkershoek and older writers had supported the more stringent rule, which, it will be observed, Lord Stowell held still defensible.

[3] See 5 CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRACTIQUE, 5 ed., §§ 2776, 2777; HALL, INTERNATIONAL LAW, 6 ed., 666; MOSELEY, WHAT IS CONTRABAND AND WHAT IS NOT, 55; TUDOR, CAS. MERCANTILE AND MARITIME LAW, 3 ed., 986, 991–92; 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 291.

[4] 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1263. *Cf.* The Commercen, 1 Wheat. (U. S.) 382. See Chase, C. J., in The Bermuda, 3 Wall. (U. S.) 514, 555 *et seq.*: This "indulgent rule" is "a great but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband, as well as the cargo. But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof. The rule requires good faith. . . ."

In The Hakan the court attaches an importance perhaps undue to its interpretation (which is not very exact) of the United States Naval War Code of 1900, and to the later views of Rear-Admiral Stockton. *Cf.* WILSON, DRAFT NO. 1 FOR PROVISIONAL INSTRUCTIONS FOR THE NAVY, DEFINING . . . CONTRABAND OF WAR, NAVAL WAR COLLEGE, 1913. It should be observed that neither Rear-Admiral Stockton, nor any

and by a majority of the continental countries.[5] It is this rule which a British court has now deliberately abandoned in favor of a more strict one, to wit, that the neutral ship is to be confiscated whenever more than half its cargo, by value, weight, volume, or freight value, is contraband. This new rule had previously been promulgated by an Order in Council, upon which, however, under the rule of *The Zamora*,[6] the court rightly declined to rely. The decision is based, instead, upon an alleged adoption of the new rule by most of the other maritime nations, consequent, the court seems to think, to Article 40 of the ill-fated Declaration of London.

The practical results of the decisions are relatively unimportant, for it is rare indeed that a modern shipowner will be unaware that more than half his cargo is contraband, difficult though it might be to prove his knowledge. The new rule is substantially as just to the shipowner as was the former English rule. And although this may afford a belligerent, under given circumstances, a rather facile method of building up a mercantile marine, or, as in England's case, of retaining an already-won supremacy in that field, the old rule also had possibilities of this.

The principle upon which the court rests the decisions may, however, be perilous in the extreme. Article 40 of the Declaration of London, which adopted the half-cargo rule, must be read with Article 35, which exempted from capture conditional contraband on a neutral vessel bound to a neutral port.[7] In the second of these cases, *The Maricaibo*, the new rule is unhesitatingly applied to precisely that case. For its new rule in entirety, then, the court can draw from the Declaration of London not even the dubious sanction of an unratified declaration of principles. Accordingly it is compelled to rely solely upon an alleged prior adoption of the new rule, or its equivalent, by a majority of maritime powers.[8] It is clear that the new rule cannot have been adopted before the commencement of the present war.[9] What the court relies upon is an adoption of the rule in the course of the war by both groups of belligerents.[10]

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publication of the Naval War College, necessarily expresses the official views of the United States. The present view of the United States may perhaps be that of Article 8 of the Code of Maritime Neutrality, which exempts neutral vessels from confiscation for carrying contraband, in all cases. See note 12, *infra*.

[5] 5 CALVO, *supra*, § 2778: "Deux principes paraissent guider la practique des nations maritimes: les unes limitent la confiscation à la portion illicite du chargement du navire neutre, tandis que d'autres l'etendent au chargement tout entier et au navire même, lorsque la contrebande forme la partie principale de la cargaison." *Cf.* The Hakan, 278 *et seq.*

[6] [1916] 2 A. C. 77, discussed in 30 HARV. L. REV. 66.

[7] See 2 WESTLAKE, *supra*, 255 *et seq.*

[8] In The Hakan the court makes a comprehensive summary of the law of the nations participating in the International Naval Conference of 1908–1909, preceding the Declaration of London. Even from this not wholly accurate summary it appears that Japan only, of the nations represented, could be considered to hold the half-cargo rule at that time.

[9] WHEATON, ELEMENTS OF INTERNATIONAL LAW, 5 ed. (an English text of authority), 751, considers the British rule in 1916 to be exactly that laid down by Lord Stowell in 1798, despite the Declaration of London and the divergent views of continental countries. See PYKE, THE LAW OF CONTRABAND OF WAR (English, 1915), 231 *et seq.* *Cf.* note 8, *supra*.

[10] See The Hakan, 280, 281. The United States is erroneously regarded as having adopted the rule also. See note 4, *supra*.

While the fact of such an acceptance by the Triple Alliance is not wholly clear,[11] for the purposes of this note it will be assumed. It should be observed that no neutral country has at any recent time held the new rule.[12] It is a rule whose adoption can hardly injure belligerents; it can only injure neutrals directly, or (theoretically only) discourage the carriage of contraband. Even assuming the latter effect to follow in fact, the only possible injury which the rule can inflict upon the opposing belligerent is to force it to pay higher freight rates for its contraband. The justification for the rule's adoption by a belligerent is, upon an international balance of considerations, slight indeed. The primary motive of the belligerents in adopting the rule must have been, it would seem, not even the doubtfully legitimate one of injuring their enemies, but to transfer from neutrals to themselves a part of what has now become internationally the most important of property. In setting up the new rule under such circumstances the belligerents, although perhaps constituting "a sufficiently general consensus of view and assent" of the Great Powers, have nevertheless failed, it is submitted, to establish a new rule of international law. In adopting it they sat, not as legislators, but as self-seekers; in construing it they are not judges, but parties in interest. It may indeed be further said that no change of international law by belligerents in the course of a war, no matter how numerous or important they may be, can be valid against unconsenting neutrals.[13] Only thus can international law retain even the pretence of morality. And without at least the appearance of morality it can no longer be law.

Acquiescence by neutrals in the rule of the principal cases seems doubtful.[14] The only merit of the rule — that it fixes a mathematical test easy to apply, for the confiscation of neutral property by a belligerent — will hardly be appreciated even by nations that have no policy of permanent neutrality. It will take other considerations to produce neutral consent, it would seem. The possibility that Great Britain's

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[11] This fact is indeed vital for the validity of the new rule, even accepting the court's reasoning. Article 41 of the German Prize Code is the same as Article 40 of the Declaration of London, it is true; but the restrictive Article 35 of the Declaration of London is also to be found in the German Prize Code. So that a German prize court would probably have released such a ship as The Maricaibo, which the British court condemned. See HUBERICH AND KING, THE PRIZE CODE OF THE GERMAN EMPIRE AS IN FORCE JULY 1ST, 1915, especially at pp. 30 and 105. There is no reason to believe that the German prize court decisions cited in The Hakan (The Batavia, June 1, 1915, and The Brilliant, August 14, 1915) are on facts similar to those of The Maricaibo. Austria-Hungary likewise appears to have done no more than adopt both Articles 35 and 40 of the Declaration of London.

[12] *Cf.* Article 8 of the proposed Code of Maritime Neutrality, of the American Institute of International Law, made up of representatives from almost all the American republics, in session at Havana in January. The code is reprinted in full in THE CHRISTIAN SCIENCE MONITOR, January 25, 1917.

[13] *Cf.* the somewhat extreme views of Sir Francis Piggott, late Chief Justice of Hong-Kong, in THE NEUTRAL MERCHANT, ix: "Arbitration after the war, and compensation, are the only remedies when neutral property has been injured. Then, and then only, can any new departure by a belligerent be tested by a reference to fundamental principles. The reason is obvious. International law is a progressive science; it has not yet pronounced its last word on the relations between belligerency and neutrality. A neutral government is not entitled to assume that it alone is the judge of what that last word will be."

[14] See note 12, *supra*.

ends may be identical with the United States' has already been recognized by this REVIEW.[15] Whether that possibility still exists when the situation to be approved is the maintenance of the present mercantile marine status of the nations, is another question.

THE CONFLICT OF PRESUMPTIONS ON SUCCESSIVE MARRIAGES BY THE SAME PERSON. — In the recent California case of *In re Hughson's Estate: Brigham* v. *Hughson*,[1] the plaintiff, who had been married to the decedent by a ceremonial marriage, claimed a share in the estate as surviving wife. The defendant proved a ceremonial marriage between herself and the decedent, subsequent in time to the marriage of the plaintiff with the decedent, and proved that the marriage relation so created had continued till the time of decedent's death. It appeared that the plaintiff had remarried twice after the disappearance of the decedent, believing him dead. It further appeared that there were ten children by the marriage between the decedent and the defendant. The plaintiff declared that her marriage with the decedent continued down to the time of his death. The court held that the burden of proving that the first marriage had not been set aside by divorce was on the plaintiff, and that this burden had not been met, and that a divorce would therefore be presumed in favor of the second marriage.

Presumptions must necessarily play a large part in the proof of marriages. Actual evidence of the ceremony, or of its incidents, cannot always be procured, and proof of valid marriages would fail if such evidence were required. As a result a broad presumption in favor of the validity of apparent marriages characterizes English and American law.[2] This presumption not only dispenses with proof of ceremonial formalities where some form of marriage is shown to have been performed,[3] but predicates marriages, regardless of forms, on cohabitation and repute in the community.[4] Moreover, marriages, once established, are presumed to continue, aside from affirmative evidence to the contrary, or conflict of presumptions,[5] and the burden of proof is heavy upon one who attacks the validity of the protected status.[6]

As is usually the case where the law is related in terms of presumptions, difficulties arise where two presumptions in the same field conflict. So where a husband or wife contracts a second marriage before the termina-

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[15] 30 HARV. L. REV. 279, 283.

[1] 160 Pac. 548.

[2] Piers *v.* Piers, 2 H. L. Cas. 331; Dickerson *v.* Brown, 49 Miss. 357, 371, 372. The maxim *semper praesumitur pro matrimonio* seems to be an application of the general common law presumption in favor of innocence.

[3] Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78; Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093. See Cooley, J., in Hutchins *v.* Kimmell, 31 Mich. 126, 130, and cases cited. The authority of the celebrant and the capacity of the parties, etc., are covered by the presumption.

[4] Mitchell *v.* Mitchell, 11 Vt. 134. See 1 BISHOP, MARRIAGE, SEPARATION AND DIVORCE, §§ 935, 936. See a complete collection of cases in L. R. A. 1915 E, 8, 56, 87. Common law marriage has been changed in many states by statute.

[5] Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. 371.

[6] Patterson *v.* Gaines, 6 How. (U. S.) 550.